STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EA99FB-63747

Jerry W. Mears,

Complainant,

v.

Marina District Development Co., LLC,

Respondent.

Administrative Action

FINDING OF PROBABLE CAUSE

On April 4, 2013, Jerry W. Mears (Complainant) filed a verified complaint with the New Jersey Division on Civil Rights (DCR) alleging that his former employer, Marina District Development Company, LLC (Respondent), fired him in violation of the New Jersey Family Leave Act (NJFLA), N.J.S.A. 34:11B-1, et seq. Respondent denied violating the NJFLA. The DCR Director reviewed the DCR's ensuing investigation and now finds as follows.

Respondent owns and operates a casino hotel in Atlantic City, known as the Borgata. Respondent's personnel policy states that employees are assessed points for attendance violations such as call outs, no call/no show, lateness, incomplete shifts, and job abandonments. For example, the policy states that Respondent will assess one point against an employee for "absence with 2 hour's notice," and 1.5 points for "absence with less than 2 hour's notice." When an employee accrues seven points, he or she is issued a "final warning." If the employee receives eight points, his or her employment is terminated. See "Attendance and Punctuality Policy," Employee Handbook, 059 (eff. Jul. 3, 2003, rev. Mar. 28, 2013).

A point is deducted when an employee has not been absent, late, or earned any attendance points for ninety days. Ibid. Employees are not assessed points for taking qualifying family medical leave. Ibid. Respondent's personnel policy states in pertinent part:

> In circumstances where leave is covered by Borgata's FMLA policy, accommodation policy, or other federal, state, or local leave entitlements, team members will not be assessed points under this policy, subject to a team member satisfying applicable notice and certification requirements. Borgata reserves the right to review each situation on a case-by-case basis. Team members who miss work due to the medical need of himself or herself or an immediate family member should review the leave of absences guidelines and accommodation policy. It is understood there may be extenuating circumstances when a team member has attendance issues and such circumstances may be considered in the administration of this policy.
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> [Ibid.]

Complainant is an Atlantic City resident who was hired by Respondent as a line server on January 19, 2011, earning $7.61 per hour. On June 7, 2011, he became an intermediate cook earning $9.57 per hour. During the course of his employment, he received seven final warnings.

On February 19, 2013, his wife complained that she felt disoriented and dizzy. She was admitted to a hospital emergency room where she was diagnosed with a cyst in her brain and discharged after three days. The day she was admitted, Complainant called the Dining Service Manager, Robert Phillips. He told Phillips that he could not go to work because of his wife's sudden hospitalization and asked that he not be penalized under the circumstances. At the time, he had 7.5 points and was therefore a half point away from automatic termination. Complainant stated that Phillips told him there was nothing he could do, and that Complainant should notify the centralized call-out center.[1] Complainant followed Phillips' instruction and called the call-out center.

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[1] Respondent's attendance policy states, in pertinent part:

> Each team member is responsible for contacting the Centralized Call Out Center, located in the Customer Care Center, at 609-317-SICK (7425), at least two (2) hours prior to the beginning of each shift if they are going to be absent and/or they are going to be unavoidably detained.
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> Each team member will provide their name, team member number, department, shift, start time and reason for call out . . .
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> Each time member is responsible for notifying the Centralized Call Out Center of any intermittent leave time taken, additional absence or lateness each day, except in bereavement circumstances.
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> The Centralized Call Out Center will contact the appropriate department manager on duty. Each manager will determine if the call out needs to be covered and will be responsible for covering all call outs and tardiness events.
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> [Employee Handbook, supra.]

Complainant told DCR that the call-out center is an automated system that asks employees to declare whether the day they are calling out is a sick day, late, or leave under the Family Medical Leave Act (FMLA). He stated that the system does not offer the option of leaving a voicemail. He stated that because he had been told that his FMLA was exhausted, he did not select the FMLA option. Respondent's records indicate that Complainant called the center at 8:20 p.m., and his regular shift was from 12 a.m. to 8 a.m.

The next day, February 20, 2013, Complainant was 55 minutes late for his 12 a.m. shift. He told Chef Carl Maslowski that he had spoken to Phillips the prior day about his wife's sudden hospitalization, and was late because he had been at the hospital all night. Maslowski asked how he got in touch with Phillips (who had not been at work) and then told Complainant to submit a FMLA request. Complainant stated that after his shift ended, he obtained an FMLA request form but the hospital refused to fill it out, telling him that it needed to be completed by his wife's doctor.

The next day, February 21, 2013, Complainant reported to work but was told that he was being discharged because he had been assessed one point for calling out on February 19, and a half point for lateness on February 20. Complainant alleges that when he told Phillips and Maslowski that he could not get the FMLA form until the following week, Maslowski told him to have the form filled out and then consult his union representative.[2]

On February 27, 2013, during a scheduled appointment, his wife's health care provider filled out a FMLA request, which confirmed that she had been hospitalized from February 19, to 21, 2013, and stated that she would need care on an intermittent basis for a year. See Jenna L. Baumgartel, PA-C, "Cert. of Health Care Provider for Family Member's Serious Health Condition, Section III," US Dep't Labor, Form WH-380-F, Feb. 27, 2013. Elsewhere, the note stated:

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[2] For purposes of this disposition only, the Director accepts Complainant's characterizations of his conversations with Phillips and Maslowski. Respondent did not produce either witness for interview despite repeated requests.

> Pt has new diagnosis of brain cyst & needs follow up w/ surgeon for possible removal . . . . [Type of care] depends on outcome of surgery . . . Pt will need off possible 2-3 days per month depending on care & state. Husband needs to be home to provide complete care to wife during recovery.
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> [Ibid.]

On March 4, 2013, Respondent received Complainant's written request for family leave. Respondent replied with a letter that stated, in pertinent part, "In reviewing your file, it was found that your employment was terminated on February 21, 2013. Therefore, your request cannot be processed." See Letter from G. Pellerito, Benefits Specialist, to J. Mears, Mar. 14, 2013.

On March 22, 2013, Complainant, accompanied by a union representative, appeared at a grievance hearing. The termination was upheld. The document memorializing the decision does not provide a substantive basis for the decision but merely states, in pertinent part, "In consideration of the testimony presented at the hearing, this grievance is denied and the termination is maintained." See Letter from V. North, Talent Relations Specialist, to R. Paduano, Grievance Officer, Local 54, Mar. 25, 2014.

Respondent's records show that it approved FMLA leave for Complainant from July 6, 2012, to October 13, 2012, which he used on an intermittent basis to address his own health conditions. Complainant did not receive points for taking FMLA leave. He used 23 out of the 60 days granted by FMLA for a twelve-month period. Complainant's prior medical leave did not reduce his eligibility for NJFLA leave because unlike the FMLA, the NJFLA does not provide leave for an employee's own health condition. Thus, on February 19, 2013, Complainant was entitled to an additional twelve weeks of leave under the NJFLA to care for a seriously ill family member.

Analysis

The NJFLA, adopted in 1989, established the employee's right to take leave without risk of termination of employment or retaliation and without loss of certain benefits. N.J.S.A. 34:11B-2. The Legislature reasoned that employees should not have to "choose between job security and parenting or providing care for ill family members." N.J.S.A. 34:11B-2; see e.g., D'Alia v Allied-Signal Corp., 260 N.J. Super. 1, 6 (App. Div. 1992) (noting that the NJFLA "represents the

culmination of a comprehensive legislative effort to maintain the integrity of the family unit and promote flexibility and productivity in the work place.")

The NJFLA entitles an eligible employee[3] to twelve weeks of family leave in any 24-month period upon advance notice to the employer[4] for the (1) birth of a child of the employee; (2) placement for adoption of a child with an employee; or the (3) serious health condition[5] of family member of the employee, including a spouse. N.J.S.A. 34:11B-4. In addition to taking consecutive weeks off, "such leave may be taken intermittently, N.J.S.A. 34:11B-4a, on a reduced leave schedule, so long as the employee provides reasonable notice under the circumstances and avoids undue disruption of the employer's operations. N.J.S.A. 34:11B-5." DePalma v. Building Inspect. Underwriters, 350 N.J. Super. 195, 212 (App. Div. 2002); cf. N.J.A.C. 13:14-1.5(c)(1) (employee must provide the employer with notice "no later than 30 days prior to the commencement of the leave, except where emergent circumstances warrant shorter notice.")

When the employee returns from leave, he or she must be restored to the previous position or another position with equivalent employment benefits, pay, and other terms and conditions of employment. N.J.S.A. 34:11B-7. To state a claim under the NJFLA, a plaintiff must show that he or she was: (1) employed by the respondent; (2) performing satisfactorily; (3) that a qualifying leave event occurred; (4) he or she took or sought to take leave from her employment; and (5) he or she suffered an adverse employment action as a result. DePalma, supra, 350 N.J. Super. at 213.

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[3] An eligible "employee" for purposes of the NJFLA is someone who has been "employed by the same employer in the State of New Jersey for 12 months or more and has worked 1,000 or more base hours during the preceding 12 month period. An employee is considered to be employed in the State of New Jersey if: (1) Such employee works in New Jersey; or (2) Such employee routinely performs some work in New Jersey and the employee's base of operations or the place from which such work is directed and controlled is in New Jersey." N.J.A.C. 13:14-1.2

[4] A covered "employer" for purposes of the NJFLA is an entity that employs fifty or more employees, "whether employed in New Jersey or not, for each working day during each of twenty or more calendar workweeks in the then current or immediately preceding calendar year." Ibid.

[5] A "serious health condition" for purposes of NJFLA is an "illness, injury, impairment, or physical or mental condition which requires: (1) Inpatient care in a hospital, hospice, or residential medical care facility; or (2) Continuing medical treatment or continuing supervision by a health care provider." N.J.A.C. 13:14-1.2.

When the leave is unforeseeable, the employee's "obligation is to provide sufficient information for an employer to reasonably determine whether the FMLA *may* apply to the leave request." Lichtenstein v. University of Pittsburgh Med. Ctr., 691 F.3d 294 (3d Cir. 2012) (emphasis in original).[6] In Lichtenstein, the plaintiff was a psychiatric technician whose short tenure working at the defendant hospital was "tarnished by attendance and scheduling difficulties." Id. at 296. On the day that she was scheduled to return from a one-week vacation, she called her supervisor and announced that she would not be coming to work because her mother had been rushed to the emergency room after collapsing with excruciating pain in her leg. The hospital fired her for attendance violations. She alleged that the hospital violated the FMLA. The hospital argued that she had not adequately invoked her right to family leave because merely stating that her mother had been taken to the emergency room was insufficient for the employer to "ascertain whether the leave [was] potentially FMLA-qualifying." Id. 303. The trial court agreed and granted the hospital's motion for summary judgment. The trial court reasoned:

> [T]he fact that a family member has been taken to the emergency room does not necessarily reflect a serious medical condition sufficient to support a request for leave under the FMLA. While the condition precipitating an emergency room visit may be serious, the condition might not require ongoing hospitalization or medical treatment.
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> [Id. at 304.]

The Third Circuit reversed and reinstated the FMLA claims. In so doing, the Court stated that the notice requirement is neither "onerous," id. at 303 (citing Burnett v. LFW, Inc., 472 F.3d 471, 478 (7th Cir. 2006)), nor "formalistic or stringent," id. at 303 (citing Sarnowski v. Air Brooke Limousine, Inc., 510 F.3d 398. 402 (3d Cir. 2007)), and that the "statutory and regulatory text suggests a liberal construction be given to FMLA's notice requirement." Id. at 303 (citing Sarnowski, supra, 510 F.3d at 402). The Third Circuit wrote, "The critical test is not whether the employee gave every necessary detail to determine if the FMLA applies, but how the information conveyed

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[6] The NJFLA, accompanying regulations, and case law do not discuss in depth issues regarding the adequacy of notice for unforeseeable leave. In such cases, courts often look to the FMLA for guidance. See e.g., Wopert v. Abbott Labs, 817 F. Supp.2d 424, 437-38 (D.N.J. 2011) (noting "[d]ue to the similarly of the statutes, courts apply the same standards and framework to claims under the FMLA and the NJFLA.").

to the employer is reasonably interpreted." Id. at 303 (citing Sarnowski, supra, 510 F.3d at 402). Moreover, the Court wrote, "How the employee's notice is reasonably interpreted is generally a question of fact, not law." Ibid.

Likewise, in Zawadowicz v. CVS Corp., 99 F.Supp.2d 518 (D.N.J. 2000), the Court noted that generally, the sufficiency of notice is a matter for the fact-finder to determine. Id. at 529. There, plaintiff and his wife worked for CVS in its distribution system. Plaintiff had already "received several warnings concerning attendance problems" when, in October 1996, his pregnant wife suffered significant injuries to her back and neck during a workplace accident when she was struck by falling pallets. Id. at 521 & 522. Plaintiff was granted family leave on an intermittent basis to care for his wife and for unrelated reasons. He was required to call in each day that he planned to miss work and state the reason for his non-attendance. Plaintiff called or emailed his direct supervisor whenever he planned to not show up. He did not always provide a reason. Sometimes, he merely stated that he was taking "an unpaid day." Id. at 522. Other times, he "did not specify that the was taking the day off as an 'unpaid day.'" Ibid. Eventually, CVS terminated his employment for attendance and argued that merely announcing that he was not coming to work was "too vague and therefore insufficient to put it on notice that he was missing work for an FMLA reason, i.e., his wife's medical condition." Id. at 529. In denying the employer's motion for summary judgment, the Court reasoned, among other things, that a jury could reasonably conclude that the employer knew the purpose for the absences because plaintiff's supervisor "remained apprised of his wife's medical condition." Ibid. Judge Brotman wrote:

> It is undisputed that plaintiff did not state the reason for his absences. . . . Sufficient evidence exists, however, from which a jury reasonably could conclude that CVS knew that plaintiff's post-January absences were due to his wife's condition. For instance, plaintiff typically reported his absences to [his supervisor,] James Lupinetti, a good friend of his. According to plaintiff, Mr. Lupinetti remained apprised of his wife's medical condition and even referred her to a certain physician . . . In addition, Chuck Martin requested that plaintiff "notify [him] personally or via Phone Mail (ext. 202) if he will be absent due to [his] wife's health condition." . . . At his deposition, Martin recalled that plaintiff indeed did telephone him on occasion when he missed work . . . Although Martin could not recall whether plaintiff stated the reason for his absence, it was Martin's understanding that plaintiff would contact him only if he was missing work in order to care for his wife.

[Id. at 529 (internal citations omitted).] Thus, the New Jersey federal district court, like the Third Circuit Court of Appeals, afforded a "liberal construction" to the notice requirement in favor of the employee. Lichtenstein, supra, 691 F.3d at 303 (citing Sarnowski, supra, 510 F.3d at 402).

At the conclusion of an investigation, the Director is required to determine whether there is "probable cause" which, for purposes of this analysis, means a "reasonable ground for suspicion supported by facts and circumstances strong enough to warrant a cautious person to believe that the [NJFLA] has been violated." N.J.A.C. 13:4-10:2. A finding of probable cause is not an adjudication on the merits, but merely an initial "culling-out process" where the DCR makes a preliminary determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 111 S.Ct. 799; Sprague v. Glassboro State College, 161 N.J. Super. 218, 226 (App. Div. 1978).

In view of the above, the Director finds as follows. Complainant and Respondent are covered by the provisions of NJFLA. The wife's sudden hospitalization from February 19 to 21, 2013, was a serious health condition of an employee's family member, and Respondent's imposition of one point for taking leave on February 19, was an adverse employment action that occurred after he provided notice to his supervisor of the nature and necessity for the leave. The Director is satisfied that notifying his supervisor 3.5 hours before the start of his shift that his wife was being taken to the emergency room for sudden dizziness and disorientation was "reasonable notice under the circumstances," and that there was no allegation or evidence that Complainant's call-out on February 19, 2013, caused "undue disruption of the employer's operations." DePalma, supra, 350 N.J. Super. at 212. Thus, the Director finds a reasonable ground for suspicion supported by facts and circumstances strong enough to warrant a cautious person to believe that the imposition of that point for Complainant's call-out on February 19 violated the NJFLA.

The more difficult issue is whether Respondent violated the NJFLA by imposing a half point for Complainant's late arrival on February 20, 2013. There is no evidence in the record that

Complainant notified Respondent before he arrived at work on February 20, that he needed to take additional time off that day as part of an exercise of family leave. In fact, Complainant acknowledged to the DCR investigator that after reaching the call-out center on February 19, he had no contact with Respondent until he arrived late on February 20. Moreover, courts that have scrutinized the adequacy of notice have stated that an "employer is not required to be clairvoyant." Vasser v. Genesis Health Ventures, unpublished, civil action no. 04-2648 (JBS) (D.N.J. Jan. 20, 2005) (quoting Satterfield v. Wal-Mart, 135 F.3d 973, 980 (5th Cir.), cert. den'd 525 U.S. 826 (1998)). Still, for purposes of this disposition only, the Director finds reasonable grounds to warrant a cautious person to conclude that based on Complainant's communications on February 19, 2013, and surrounding circumstances, Respondent had sufficient notice that Complainant's short, intermittent leave the following day was also covered by the NJFLA.

In sum, the weight of the evidence supports a reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that Respondent violated the NJFLA when it assessed 1.5 points against Complainant for taking family leave on February 19, and 20, 2013, and then refused to rescind those attendance points after receiving confirmation on March 4, 2013, that Complainant was out due to events covered by the NJFLA.

WHEREFORE, it is on this 25th day of MARCH, 2014, determined and found that PROBABLE CAUSE exists to credit the allegations that Respondent violated the New Jersey Family Leave Act.

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS